FEDERALLY SPEAKING

by Barry J. Lipson

Number 35

Welcome to **Federally Speaking,** an editorial column compiled for the members of the Western Pennsylvania Chapter of the Federal Bar Association and all FBA members. Its purpose is to keep you abreast of what is happening on the Federal scene, whether it be a landmark US Supreme Court decision, a new Federal regulation or enforcement action, a "heads ups" to Federal CLE opportunities, or other Federal legal occurrences of note. Its threefold objective is to educate, to provoke thought, and to entertain. This is the 35th column. Prior columns are available on the website of the U.S. District Court for the Western District of Pennsylvania http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm.

NEWS FLASH!

FBA WEST PENN UPSTAGES GEORGE W. While **President George W. Bush** was telling a group of supporters at a $2000-a-plate political fund raising luncheon at the Westin Convention Center Hotel in Pittsburgh, Pennsylvania that this "administration has acted on principle, has kept its word and has made progress for the American people," just a short walk away in the Engineers Society Ballroom the **FBA Western Pennsylvania Chapter** was conducting a major ***USA PATRIOT ACT Debate CLE***, where, your commentator observed, the registration line ran out the door and well up the street, and the KDKA television camera was rolling. The debaters were **U.S. Attorney Mary Beth Buchanan** and **ACLU Legal Director** (and **FBA West Penn Federal Lawyer of the Year**) **Witold (Vic) Walczak**, with **Duquesne Law School Professor Kenneth Gormley** again moderating (he had previously moderated the **Chapter's** very successful ***U.S. Supreme Court Update***). The program was originally conceived and debaters "signed on" by yours truly as a kick-off luncheon program to inaugurate the revitalization of the **Chapter's Young Lawyers Division**. **YLD Chair Charles A. Lamberton** quickly took the bit between his teeth and turned it into a major legal event (a **YLD** inaugural event is still needed). Though some may attribute this event's success to the **Chapter** not charging $2000-a-plate, some believe that the legal community preferred to learn what the **President** has actually done, instead of what he says. All present were invited to continue the ***Debate*** at the **Chapter's** annual ***Whiskey Rebellion Celebration and CLE*** at the Engineers Society on December 9, 2003.

LIBERTY'S CORNER

U.S. SUPREME COURT TAKES ON ISSUE OF GUANTANAMO BAY DETAINEES. The **U.S. Supreme Court** has agreed to hear the appeals of ***Rasul v. Bush***, No. 03-334, and ***Al Odah v. United States***, No. 03-343, Guantanamo Bay detainees. The question before the Court is whether **American Courts** have jurisdiction to adjudicate cases filed by foreign detainees "captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base." In ***Al Odah*** the D.C. Circuit held that such individuals "cannot seek release based on violations of the **Constitution** or treaties or federal law" (***Al Odah v. United States***, 321 F.3d 1134 (DC Circuit 2003)). Presumably persuasive in convincing the High Court to hear these consolidated cases were ***amicus*** briefs filed by retired military officers, former Federal Judges and, perhaps most influential, ***Fred Korematsu***, **Japanese-American World War II Internee** and the unsuccessful party in the infamous **High Court** case of ***Korematsu v. United States***, 323 U.S. 214 (1944), which the Korematsu

brief labels as "a constitutional pariah." Our allies the British are also keenly interested as they have nationals detained there. Hopefully, the High Court will not again find it necessary to correct itself decades hence.

PA SUPREMES SING TUNE OF RIGHTEOUS FEDERAL ANONYMOUS FREE SPEECH RIGHTS!

It seems that the website "Grant Street '99'" allegedly accused Pennsylvania Superior Court Judge Joan Orie Melvin of engaging in "misconduct" by lobbying the Pennsylvania Governor's Office to appoint a specific attorney to fill a judicial vacancy. Judge Melvin, apparently feeling she was in "Mudville" with three strikes against her, filed a defamation action in County Court and forthwith commenced discovery to uncover the identities of her accusers. The problem is that such a revelation could have a chilling affect on **political free speech**. The Pennsylvania Supreme Court acknowledged that it "is clear that once appellants' identities are disclosed, their **First Amendment** claim is irreparably lost as there are no means by which to later cure such disclosure," that "generally, the constitutional right to anonymous free speech is a right deeply rooted in public policy that goes beyond this particular litigation, and that it falls within the class of rights that are too important to be denied review," citing extensively to the **U.S. Supreme Court's** support, under certain circumstances, of a **right to anonymous free speech**. The State High Court then determined that this was far too important an issue to refuse to permit a timely appeal from this interlocutory discovery order (normally such orders may only be appealed at the conclusion of the trial) and remanded this **First Amendment** issue to the Superior Court for initial appellate review, ironically the Court upon which Judge Melvin sits. So the PA Supremes' do, indeed, seem to be singing a tune of righteous **Federal anonymous free speech rights**.

FED-POURRI™

SOMETHING SMELLS ROTTEN IN WASHINGTON! Do you see any problems, **Constitutional** or otherwise, with the police, say Washington police detectives, using the **U.S. Mail** to trick a **U.S. citizen** residing out of their jurisdiction, say in New Jersey, into unwittingly mailing back to them incriminating evidence? Do you see any such problems with these local police printing up letterheads and envelopes claiming they are attorneys-at-law and then using same to pose as attorneys-at-law in their use of the **U.S. Mail** to deceive a resident of another jurisdiction into believing that he was entitled to receive a payment from a bogus class action law suit allegedly involving Washington parking tickets? Indeed, as they were presumably offering to assist him as lawyers in obtaining these funds for him in a legal proceeding, could not this be construed as an unlawful solicitation by a non-lawyer to provide legal services/representation and/or as the creation and breach of a fiduciary relationship? So what do we have here, breach of a **Constitutionally protected right of privacy, lack of due process**, entrapment-after-the-fact, unfair and deceptive practices, **mail fraud,** garden-variety fraud, the unauthorized practice of law, breach of fiduciary duty, forgery, passing-off, etc., or in the words of Deanna Nollette of the Washington police, just "excellent police work," utilizing "an excellent strategy in that it allowed them to get the evidence they needed in a minimally intrusive way." The "strategy"? To trick a distant murder suspect into "voluntarily" providing a sample of his DNA by inducing him, bad breath and all, to lick, seal and mail a return envelope, so that the DNA in his saliva could be compared with DNA found on the victim. The **National Association of Criminal Defense Lawyers** is concerned that serious harm can be done to our criminal justice system if the police are permitted to pass themselves off as attorneys. Judge Sharon Armstrong of the Superior Court, although finding that the police had broken the law by passing themselves off as attorneys, held that they are permitted to do so to apprehend lawbreakers asserting that "the mere fact that the police violated the law in posing as lawyers does not require dismissal," and citing as examples of other allegedly permissible police stings that also involve commission by the police of illegal acts, the creating of bogus businesses for the fencing of stolen goods, the making of payments to hookers for sex, and the purchasing of illicit drugs (***People v. John Athan***, Superior Ct, Kings County, Washington, November 17, 2003). There are two issues here. First the extent and manner permissible in the use of fraud and deceit by the police and, second, the extent to which, if at all, the police can engage in or appear to engage in the unauthorized practice of law. Also, could there be a private cause of action against the individual detectives? Expect an appeal to the Washington State Supreme Court here and, perhaps, to the **U.S. Supreme Court.** (The Kings County Superior Court has also recently received additional national notice for levying $400,00 in sanction against Dorsey & Whitney, Esqs, for allegedly

bringing frivolous litigation in violation of Washington State Civil Rule 11 (***Morbeck v. Kirlan Venture Capital***, Nos. 49641-7-I, 50138-1-I).) While the DNA sting was not traditional "entrapment" (as may be claimable for at least some of the cited examples), something smell rotten in Washington, but for a breather, this time not DC. Perchance, a passing case of bad breath?

IN-HOUSE COUNSEL TAKE HEED! Ignorance is not bliss! The Final Report of Neal Batson, Court-Appointed Examiner in the Enron **Chapter 11 Bankruptcy** (***In re: Enron Corp., et al.,*** U.S Bankruptcy Court, Southern District Of New York, Case No. 01-16034 (AJG)), concludes with regard to a number of Enron's in-house Counsel, including James Derrick, Esq., "Enron's General Counsel and its chief in-house attorney," that "there is sufficient evidence from which a fact-finder could determine" that in-house Counsel committed **statutory/regulatory malpractice** (Texas Rule 1.12), "committed **malpractice based on negligence**," and/or **breached their** "**fiduciary duties**," in connection with their "representation of Enron." Derrick's alleged legal transgressions include a "failure to inform himself and the Enron Board with respect to [Related Party Transactions] … or to confirm that those to whom he had delegated the responsibility were taking adequate steps to do so;" his "failure to educate himself on the facts of the LJMlI Rhythms Hedging Transaction, the conflict of interest issues presented by that transaction and governing law, so as to enable proper execution of his responsibilities as legal advisor to the Enron Board;" and his "failure to inform himself about (i) the content of the 'anonymous letters' delivered to Lay in August 2001 or (ii) the extent of Vinson & Elkins' involvement in the transactions criticized by the 'anonymous' letters, which meant that he was unable to advise Lay properly with respect to the investigation or the propriety of retaining Vinson & Elkins to conduct that investigation." Subordinate in-house Counsel alleged transgressions also included having knowledge and not revealing that Enron failed to disclose pertinent information, that Enron's Board and/or Audit and Finance Committees had not been informed of certain transactions; and that certain Enron employees were acting contrary to Enron's interests. The Report concluded that "if an attorney with knowledge of an officer's breach of **fiduciary duty** renders substantial assistance to the wrongdoer, the attorney may be liable for aiding and abetting that officer's **breach of fiduciary duty**," and that where "an attorney represents a corporation and fails to exercise the **competence and diligence** normally exercised by reasonably prudent attorneys in similar circumstances during the course of such representation, then the attorney may be liable to the corporation for **malpractice**." Then too, "an attorney who knows that a representative of the corporation has committed, or intends to commit, a violation of a legal obligation to the organization (such as a **breach of a fiduciary duty**) or a violation of law which reasonably might be imputed to the organization (such as the **dissemination of misleading financial information**), must take **remedial actions** in the best interest of the corporation" and "may have to refer the matter to a higher authority within the corporation, including the board of directors." Yes, my compatriots take heed! The in-house life is not all fun and games - and ***ignorance is not bliss!***

FOLLOW UP

WHAT'S WITH THE RIAA AND THE DIGITAL WARS? The Recording Industry Association of America (RIAA) is playing all kinds of war games, apparently out geeking the geekiest of the College Greeks! Most recently the RIAA tracked a college student through the file-sharing program Manolito P2P, linked his computer's Internet service provider (ISP) address to his University's network, and served the University with a subpoena to get his/her name. The RIAA was using here the pre-litigation subpoena power it lobbied for and got under the **Digital Millennium Copyright Act of 1998 (DMCA).** Indeed, one **U.S. Senator** reportedly has commented that "the **DMCA** subpoenas give copyright holders more power to go after suspected copyright violators than **U.S. Law Enforcement Agencies** have to seek information on terrorists." So far the RIAA has allegedly brought over 340 legal proceedings and coerced well over 156 settlements, apparently primarily from music lovers of college age. However, forces are aligning to rein in the RIAA. Recently, the ACLU moved to quash one such subpoena served on a Boston College coed on the grounds that the subpoena violated the student's **U.S. Constitutional rights of privacy** (Internet user anonymity) and **due process**. Though the coed did succumb to the RIAA's coercion and settled, the ACLU has advised that this "does not mean we're giving up the challenge to the procedures the RIAA is using or the statute itself

that purportedly authorizes this subpoena." Then too, there are negative **Congressional** reactions to the combatant tactics of the RIAA. Thus, as was reported in ***Federally Speaking*** No. 23 ("***Digital Wars And Fair Use***"), in 2002 the **Digital Media Consumers Rights Act** was "introduced in **Congress** … as a counterattack in the 'Digital Media Wars,' to preserve the time-honored **Doctrine of Fair Use**," which the **DMCA** purportedly "outlawed," and very recently **U.S. Senator** Sam Brownback (R-Kansas) has introduced legislation to stop the RIAA and others from compelling the revealing by ISP's of their suspected copyright-infringing clients' identities prior to the filing of civil litigation. It remains to be seen if the Geeks, the Greeks or the Industrialists will prevail in these Digital Wars. (See ***"PA Supremes,"*** in ***Liberty's Corner***, above.)

THE UNPUBLISHED OPINION DILEMMA REVISITED. In ***Federally Speaking***, No. 21 we first visited the unpublished opinion dilemma, apparently engendered by the 1964 resolution by the **Judicial Conference of the United States** that "the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct." Since then "fewer and fewer decisions have been published" and in some **Circuits** they are even prohibited from being cited, which may violate the **First Amendment** (see ***Federally Speaking***, Nos. 21 and 25). Also of concern is that "one survey of such opinions found that not only did the unpublished opinions 'included a surprising number of reversals, dissents, and concurrences,' but 'we discovered that outcomes among unpublished opinions showed significant associations with political party affiliation, specific professional experiences, and other characteristics of judges adjudicating the cases' (**Merritt and Brudney**, 54 Vand. L. Rev. 71, 119 (2001))." Now the **Advisory Committee on Appellate Rules** of the **U.S. Judicial Conference**, on May 15, 2003, approved for publication for public comment the proposed new **Appellate Rule** that: "No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent' or the like;" and that when cited the citing party shall attach a copy unless available on a "publicly accessible electronic database." If finally adopted after public comment by the full **Judicial Conference**, this **Appellate Rule** must be approved by the **U.S. Supreme Court** and be submitted to **Congress.** It then automatically becomes effective if not rejected by **Congress.** All in all, at least a two year process. The **Advisory Committee** did not address the more complex question of the "precedential value" of such unpublished opinions.

TEN AMENDMENTS & TEN COMMANDMENTS STAY SEPARATE. The **Earthly Supreme Court for America** has, for now, left to the **Heavenly Supreme Court** questions of selected religious doctrines entering the secular governmental plane and has thus honored the **"Separation of Church and State Doctrine"** contained in the first **Ten Amendments** to the **U.S Constitution**, the **Bill of Rights**, by letting stand the **Eleventh Circuit's** affirmance of the **Order of Removal** of the **Ten Commandments** monument from the Alabama State Judicial Building (***In re Roy S. Moore***, Nos. 03-258 and 03-468 (Nov. 3, 2003); see ***Federally Speaking***, No. 31). This **Eleventh Circuit** case involved "the contemporary installation in the Alabama State Judicial Building rotunda, by Alabama Supreme Court's Chief Justice Roy S. Moore, of a '5280-pound granite monument [which] is approximately three feet wide by three feet deep by four feet tall,' where '[t]wo tablets with rounded tops are carved into the sloping top of the monument,' and '[e]xcerpts from Exodus 20:2-17 of the King James Version of the Holy Bible, the **Ten Commandments**, are chiseled into the tablets'" (***Glassroth v. Moore***, Nos. 02-16708 & 02-16949 (11th Cir. July 1, 2003)). Chief Justice Moore not only failed to obtain **Certiorari** from the **U.S. Supreme Court,** but also, with certitude, was removed from the Judiciary by the unanimous ruling of the Court of the Judiciary of Alabama, on November 13, 2003, for placing "himself above the law" and for bringing "disrepute" to the Judiciary, through his defiance of the **Federal Court's Removal Order.**

* * *

You may contact columnist Barry J. Lipson, Esq., FBA Third Circuit Vice President, at the Law Firm of Weisman Goldman Bowen & Gross, 420 Grant Building, Pittsburgh, Pennsylvania 15219-2266 (412/566-2520; FAX 412/566-1088; E-Mail bjlipson1@netzero.com). The views expressed are those of the persons they are attributed to and are not necessarily the views of the FBA, this publication or the author. Back issues are available on the United States District Court for the Western District of Pennsylvania website and bracketed [ ] numbers refer to Columns in the Index of Columns on that site: (http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm).